Supreme Court, U.S.
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No.

IN THE UNITED STATES SUPREME COURT
October 1995 Term

JAMES ROBERT WHITWORTH **PETITIONER**

VS.

STATE OF MISSISSIPPI **RESPONDENT**

Petition for Writ of Certiorari
to the Mississippi Supreme Court

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,
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29 pp

QUESTIONS PRESENTED FOR REVIEW

ISSUE I: IN AN INDICTMENT CHARGING ONLY THE MANUFACTURE OF LESS THAN A KILOGRAM OF MARIHUANA BUT MORE THAN AN OUNCE, SHOULD THE JURY BE ALLOWED TO CONSIDER THE WEIGHT OF A PACKAGE OF DEAD STEMS KEPT IN AN AREA OF THE DEFENDANT'S HOUSE SEPARATE FROM THE LOCATION OF CERTAIN GROWING PLANTS?

ISSUE II: DID THE STATE'S DELIBERATE INTRODUCTION OF EVIDENCE OF OTHER CRIMES IN SPITE OF A RULING OF THE LOWER COURT PROHIBITING SUCH CONSTITUTE PROSECUTORIAL MISCONDUCT?

ISSUE III: IS A STATE STATUTE PROHIBITING THE MANUFACTURE OF MARIHUANA WITHIN 1500 FEET OF A SCHOOL UNCONSTITUTIONALLY VAGUE AND OVERBROAD?

ISSUE IV: IS A STATE HABITUAL OFFENDER STATUTE VIOLATIVE OF THE EIGHTH AMENDMENT BY REQUIRING ENHANCED PUNISHMENT FOR A DEFENDANT WHO OBTAINED TWO FELONY CONVICTIONS AT AGE 16?

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The Petitioner herein requests a Writ of Certiorari with respect to the decision rendered by the Mississippi Supreme Court in Whitworth v. State, 671 So.2d 666 (Miss. 1996), decided on March 28, 1996. Petitioner respectfully submits that the instant case presents special and important issues. Specifically, the state court of last resort decided a federal question in a way that conflicts with the decision of another state court of last resort and in conflict with established principals of federal constitutional law. No rehearing was sought since the opinion was rendered en banc.

Petitioner relies upon the due process provisions of the Constitution of the United States as well as the Eighth Amendment to the said Constitution. Four Mississippi statutes are in question: Miss. Code Ann. Section 41-19-139 (a)(1) and(b)(2) (Supp. 1989) prohibiting the manufacture of marihuana, Miss. Code Ann. Section 41-29-105(q)and (r)(Supp. 1989) defining "manufacture" and "marihuana," Miss. Code Ann. Section 41-29-142(1) creating enhanced punishment for drug offenders operating within 1500 feet of a school,

and Miss. Code Ann. Section 99-19-81 (Supp. 1989) creating enhanced punishment for those offenders having two prior felony convictions. The pertinent portions of those statutes are as follows:

> MS ST Sec. 41-29-139(a)(1) and (b)(2), Prohibited acts and penalties; indictments for trafficking
>
> (a) Except as authorized by this article, it is unlawful for any person knowingly or intentionally:
>
> (1) To sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance; . . .
>
> (2) In the case of a first offender who violates subsection (a) of this section with an amount less than one (1) kilogram but more than one (1) ounce of marihuana as classified in Schedule I, as set out in Section 41-29-113, such person is guilty of a felony and upon conviction may be imprisoned for not more than twenty (20) years or fined not more than Thirty Thousand Dollars ($30,000.00), or both;
>
> MS ST Sec. 41-29-105(q) and (r) (Supp. 1989)
>
> (q) "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly, by

extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term "manufacture" does not include the preparation, compounding, packaging or labeling of a controlled substance in conformity with applicable state and local law . . .

(r) "Marihuana" means all parts of the plant of the genus Cannabis and all species thereof, whether growing or not, the seeds thereof, and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its seeds, excluding hashish.

MS ST Sec. 41-29-142, Proximity to school, enhanced penalty

(1) Except as provided in subsection (f) of Section 41-29-139 or in subsection (2) of this section, any person who violates or conspires to violate Section 41-29-139(a)(1), Mississippi Code of 1972, by selling, bartering, transferring, manufacturing, distributing, dispensing or possessing with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance, in or on, or within one thousand five hundred (1,500) feet of, a building or outbuilding which is all or part of a public or private elementary, vocational or secondary school, or any church, public park, ballpark, public gymnasium, youth center or movie theater or within one thousand (1,000) feet of, the real

property comprising such public or private elementary, vocational or secondary school, or any church, public park, ballpark, public gymnasium, youth center or movie theater shall, upon conviction thereof, be punished by the term of imprisonment or a fine, or both, of that authorized by Section 41-29-139(b) and, in the discretion of the court, may be punished by a term of imprisonment or a fine, or both, of up to twice that authorized by Section 41-29-139(b).

MS ST Sec. 99-19-81, Habitual criminals: maximum term

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

STATEMENT OF THE CASE

James Robert Whitworth was charged in a multicount indictment. He was tried only on Count 6 of the indictment which alleged that he did "... manufacture a controlled substance, to-wit: Marihuana, Less than One (1) Kilogram but more than One (1) Ounce...." The offense was alleged to have occurred within 1500 feet of a public elementary school in violation of Section 41-29-142(1), Miss. Code Ann. 1972, as amended. In addition, Whitworth was charged as an habitual offender pursuant to Section 99-19-81, Miss. Code Ann. 1972, as amended.

The charge was called up for trial on March 17, 1992, before the Circuit Court of DeSoto County, Mississippi, and on March 18, 1992, the jury returned a verdict of guilty as charged. On May 26, 1992, Whitworth was sentenced to serve a term of twenty (20) years in the Mississippi Department of Corrections, said sentence being imposed pursuant to the habitual offender statute, which means that he will not be eligible for parole or any other form of early release.

During the trial of the case, Officer Huey Griffin of the Horn Lake, Mississippi Police Department testified that he went to Whitworth's home on the morning of April 23, 1991, and as he arrived on the scene, he saw Whitworth running underneath the carport of the house and into a storage room. (T. 129) Griffin stated that Whitworth was trying to climb into the attic through an outside entrance when several pots containing growing marihuana plants fell out on the floor of the storage room in plain view. (T. 131) Subsequently, the plants were seized along with various items of paraphernalia allegedly used in the manufacture of marihuana. In addition, a quantity of marihuana seeds and stems were seized from inside Whitworth's residence. (T. 174, 177, 180, 181) The proof showed that the weight of the marihuana actually being grown was 9.5 grams or approximately one-third of an ounce. (T. 221) The weight of the marihuana seeds was 422.2 grams and the weight of the marihuana stems was 62.4 grams (71.9 total grams less the 9.5 grams of growing plants) (T. 236) Although the trial judge precluded the jury from

considering the 422.2 grams in seeds, he allowed them to consider the marihuana stems in determining whether or not Whitworth was manufacturing more than one ounce of marihuana. It is interesting to note that this issue is further clouded by the fact that the State actually failed to introduce the stems into evidence during its case in chief and was allowed to do so, over objection, after both parties had rested their cases. (T. 274-79)

Whitworth was sentenced as an habitual offender pursuant to Section 99-19-81, Miss. Code Ann. 1972, as amended. At sentencing the State was allowed to offer into evidence, over Whitworth's objection, two convictions obtained by Whitworth as a result of incidents occurring twenty-one years before the instant offense at a time when Whitworth was only sixteen (16) years of age.

Whitworth made timely objections to each of the issues presented for review. With respect to Issue I, Whitworth filed a pretrial motion in limine to preclude the State from offering the seeds and stems into evidence

since they were not being "manufactured." Whitworth further objected when each of the exhibits in question were offered into evidence. Whitworth further raised the issue on his Motion for Directed Verdict at the close of the State's case in chief. (T. 256-67) Whitworth likewise objected to Instruction C-11 on this same basis. (T. 272) Finally, Whitworth argued this issue strenuously on his Motion for Judgment Notwithstanding the Verdict. (T. 308)

With respect to Issue II, Whitworth made a motion at the outset of the trial, in limine to preclude the State from offering proof relative to the other alleged offenses, whether through argument, voir dire, or presentation of evidence. (T. 43) The trial Court sustained the motion, ruling that "the motion .... is well taken regarding the evidence of other crimes and more specifically the crimes as alleged in Counts 1 through 5 of the Indictment." (T. 43) The Trial Court Judge further noted that "clearly under Rule 404(b) and the case law, then the evidence of these other crimes as alleged in Counts 1 through 5 would be excluded." (T. 44) As

soon as the prosecutor violated the court's ruling by interjecting the fact that Whitworth was the subject of more than one investigation, defense counsel approached the bench and moved for a mistrial. (T. 227) In response, the prosecutor stated, "I was simply trying to bring out that there were two separate investigations." (T. 229) (Emphasis added) The trial judge, nevertheless, denied the motion for mistrial. (T. 230)

With respect to Issue III, defense counsel moved in limine to exclude proof concerning the distance from Whitworth's house and the neighboring school, citing due process violations inherent in the applicable statute. (T. 207-208)

Finally, with respect to Issue IV, defense counsel made timely objections to the introduction of Whitworth's prior convictions where the incidents charged were alleged to have occurred when Whitworth was only sixteen (16) years of age.

Each of the issues presented herein for review were previously submitted to the Mississippi Supreme

Court (See Statement of Issues I, II, III, and IV in Appellant's Brief to the Mississippi Supreme Court).

ARGUMENT

The instant case presents special and important reasons for granting review on writ of certiorari. Specifically, the state court of last resort has decided several federal questions in a way that conflicts with the decisions of other state court's of last resort and with established principals of federal Constitutional law.

ISSUE I: IN AN INDICTMENT CHARGING ONLY THE MANUFACTURE OF LESS THAN A KILOGRAM OF MARIHUANA BUT MORE THAN AN OUNCE, SHOULD THE JURY BE ALLOWED TO CONSIDER THE WEIGHT OF A PACKAGE OF DEAD STEMS KEPT IN AN AREA OF THE HOUSE SEPARATE FROM THE LOCATION OF CERTAIN GROWING PLANTS?

Of the very few states that have addressed some aspect of this issue, at least three states have held that the stems of a marihuana plant should not be included for purposes of determining weight. In McIntire v. State, 381 So.2d 1154, 1155 (Fla. App. 1980), the Appellant

had been convicted for the felony offense of delivery of cannabis in excess of five grams. The Florida District Court of Appeals reversed the conviction and held that "the measuring of cannabis should exclude both stems and stalks. Id., citing Purifoy v. State, 359 So.2d 446 (Fla. 1978).

Likewise, in State v. Infante, 260 N.W.2d 323, 325 (Neb. 1977), the Appellant had been charged and convicted for possession of more than 1 pound of marihuana. The Nebraska court held that the mature stalk of a marihuana plant should not be included in the weighing process.

Finally, in Sessions v. State, 789 P.2d 1242 (Nev. 1990), the Appellant was charged with trafficking in marihuana weighing over 100 pounds. The Supreme Court of Nevada reversed the conviction and held that "marihuana," within the Nevada statutory definition, does not include stems, stalks, roots an dirt. See also State v. Bollander, 515 P.2d 329, 332 (Ariz. 1973) (marihuana is commonly understood to mean green, leafy substance composed primarily of leaves of the cannabis sativa

plant in its natural state); State v. Zeiter, 580 P.2d 331, 333 (Ariz. 1978) (marihuana seeds are not the "green leafy substance" and possession of same is therefore not a criminal offense).

In the instant case, Whitworth was only charged with "manufacturing" marihuana, as opposed to "possessing." Thus, the weight to be considered should only include those plants that were being manufactured, or at least capable of being manufactured. The record here established that the growing plants were being kept in the attic of Whitworth's residence which was accessible only from an outside storage room. The dead stems at issue were found inside the residence, in an area separate and apart from the growing plants. There was no evidence presented to establish that Whitworth had ever grown the dead stems. For this reason, the instant case presents even a more compelling factual scenario than the three cases cited above. See also State v. Saude, 769 P.2d 784, 785 (Or.App. 1989) (mere presence at scene of manufacture, even with knowledge of such activity, is

insufficient to establish crime of unlawful manufacture); State v. Lucks, 531 P.2d 855, 858-59 (Ha. 1975) (crime of cultivation contemplates (1) exercise of dominion or control and (2) care and attention given to plants to promote their growth). The Sixth and Fourteenth Amendments to the United States Constitution assure to the Appellant herein the right to be informed of the nature and the material element of the accusation against him. He is charged under the statute only to the extent that the indictment alleges acts which are defined as unlawful under the statute. Whitworth's conviction and sentence was therefore a violation of the said provisions of the United States Constitution.

ISSUE II: DID THE STATE'S DELIBERATE INTRODUCTION OF EVIDENCE OF OTHER CRIMES IN SPITE OF A RULING OF THE LOWER COURT PROHIBITING SUCH CONSTITUTE PROSECUTORIAL MISCONDUCT?

At the outset of the trial, the court ruled that the State could not introduce evidence of other crimes

allegedly committed by Whitworth, and in particular the evidence of the crimes alleged in the remaining counts of the multicount indictment which were not being tried. The prosecutor, nevertheless, questioned a police officer concerning "other investigations" of Whitworth. Following defense counsel's objection, the prosecutor acknowledged that he was "simply trying to bring out that there were two separate investigations."

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that he shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. U.S., 295 U.S. 78, 88 (1935). Misconduct exists when a prosecutor seeks to introduce evidence that is clearly inadmissible. See U.S. v. Martino, 648 F.2d 367 (5th Cir. 1981) (lie detector test); Kercheval v.

U.S., 274 U.S. 220 (1927) (defendant's withdrawal of the previously entered guilty plea); U.S. v. Handly, 591 F.2d 115 (5th Cir. 1979) (convictions of the defendant's co-conspirators at separate trials by different juries); U.S. v. Corona, 551 F.2d 1386 (5th Cir. 1977) (co-defendant convictions); U.S. v. Sehnal, 930 F.2d 1420 (9th Cir.), *cert. denied*, 112 S.Ct. 300 (1991) (defendant's refusal to testify); U.S. v. Newman, 943 F.2d 1155 (9th Cir. 1991) (testimony that defendant invoked his right to remain silent).

In the case at bar, the prosecutor deliberately sought to introduce the fact that Whitworth was the subject of other investigations by the local police. Such evidence had already been deemed inadmissible and for this reason, the prosecutor's conduct was improper and in violation of established federal law.

ISSUE III: IS A STATE STATUTE PROHIBITING THE MANUFACTURE OF MARIHUANA WITHIN 1500 FEET OF A SCHOOL UNCONSTITUTIONALLY VAGUE AND OVERBROAD?

A statute is generally considered overbroad if it sweeps within its prohibitions other activities that are constitutionally protected. Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972). It is the clear intent of Miss. Code Ann. Section 41-29-142 to provide enhanced punishment to those involved in the distribution of drugs to school children. The statute is constitutionally overbroad in that the conduct it punishes extends beyond the conduct it seeks to deter. In the instant case, for example, there was no showing that Whitworth had the intent to do anything that might affect school children or the nearby school. He simply happened to live near a school.

The State may contend that the constitutionality of Section 41-29-142 is a moot issue in this case because the trial judge refused to utilize the doubling provisions in sentencing. The jury was, nevertheless, repeatedly reminded of the distance to the school yard, a fact which could only serve to inflame the jury and which bore no relevance to the issue of whether or not the Defendant manufactured a particular quantity of

marihuana.

ISSUE IV: IS A STATE HABITUAL OFFENDER STATUTE VIOLATIVE OF THE EIGHTH AMENDMENT BY REQUIRING ENHANCED PUNISHMENT FOR A DEFENDANT WHO OBTAINED TWO FELONY CONVICTIONS AT AGE 16?

At sentencing the State relied upon two convictions of the Appellant dated November 26, 1974, being Cause Nos. B33804 and B33805 before the Criminal Court of Shelby County, Tennessee. The offenses charged in these two cases were alleged to have occurred on August 16, 1971. The Appellant was just over sixteen years of age (dob June 14, 1955) at the time of the offenses and was nineteen at the time of the guilty pleas.

In order for a prior conviction following a guilty plea to be used for enhancement purposes under Miss. Code Ann. Section 99-19-81, as amended, it must, on its face, show that the Defendant's plea of guilty was both knowing and voluntary. In order for a plea to be

"knowingly" given, the Defendant must understand and appreciate the constitutional rights being waived, i.e., the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238 (1969). The convictions offered by the State in the above referenced cases failed to show on their face that the pleas of guilty were "knowingly and voluntarily" entered.

Furthermore, the imposition of enhanced punishment based upon prior convictions which occurred some eighteen years ago for crimes which occurred when the Appellant was barely sixteen years of age would constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. See U.S. v. McConnell, 916 F.2d 448 (8th Cir. 1990) (expressing displeasure that even a 25-year-old conviction could be used and indicating that Congress should address problem). Support for barring the use of ancient convictions can be found in Section 4A1.2(e) of the Federal Sentencing Guidelines (15-year time limit for prior convictions), Fed. R. Evid. 609(b)(10

year time limit for use of prior conviction for impeachment purposes), and Application note 1.8 to the Salient Factor Index in the United States Parole Manual, page 63 (1988).

APPENDIX A - MISSISSIPPI SUPREME COURT OPINION AFFIRMING WHITWORTH'S CONVICTION FOR MANUFACTURING MORE THAN ONE OUNCE OF MARIJUANA

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

James Robert WHITWORTH

vs. No. 92-KA-00659-SCT

STATE of Mississippi

Decided March 28, 1996

PITTMAN, Justice, for the Court:

The defendant, James Robert Whitworth, was convicted in the Circuit Court of DeSoto County of the crime of manufacturing more than one ounce, less than one kilogram of marijuana, in violation of Miss. Code Ann. Section 41-29-139(b)(2) (Supp. 1989). This charge was count six of an indictment; the trial court severed this count from the remaining five.

Whitworth raises five issues, four of which are without merit. We address the remaining question: whether a jury may take into consideration the weight of the stems of the marijuana plant in determining whether

the defendant manufactured more than one ounce of marijuana. We hold that a jury may take into account the weight of the stems.

Whitworth argues that the trial court erred by giving instruction C-11, which allowed the jury to consider the weight of the marijuana stems if it desired to do so in its determination of the marijuana produced. Miss. Code Ann Section 41-29-105(q) defines "manufacture" as the "production, preparation, propagation, compounding, conversion or processing of [marijuana], either directly or indirectly . . . ." Whitworth contends that the marijuana stems were not being manufactured as defined by the statute and thus the weight of the stems should not be considered in determining the amount of marijuana. His main contention seems to be that the stems were not living and growing on the date of the arrest, and so they were not being manufactured.

Whitworth was charged and convicted of manufacturing marijuana. Miss. Code Ann. Section 41-29-105(r) defines "Marihuana" as "*all parts of the plant* of

the genus Cannabis and all species thereof, *whether growing or not*, the seeds thereof, and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its seeds, excluding hashish." (emphasis added) The legislature did not exclude stems in its definition. Additionally, the crime lab expert witness testified that all parts of the plant, excluding the seeds, are referred to as marijuana, and that the stems are part of the marijuana plant. Moreover, Section 41-29-139(b)(2) proscribes the penalty for a person who violates subsection (a) with respect to the weight of marijuana in question. Nowhere in this section does the legislature exclude stems from consideration. *But see Sessions v. State*, 106 Nev. 186, 789 P.2d 1242 (1990) (where in a case for trafficking marijuana weighing over one hundred pounds the court found that the stems and stalks should not have been included in the weight. The Nevada statute, like the Mississippi statute, defined "Marihuana" as all parts of the plant. However, a subsequent section of the Nevada statute excluded the mature stems of the plant.)

The statutes do not exclude the consideration of stems from the process of determining whether marijuana is manufactured. Whether Whitworth actually manufactured the marijuana in question, stems included, was properly a question for the jury, and the jury has spoken.

CONVICTION OF MANUFACTURING LESS THAN ONE (1) KILOGRAM BUT MORE THAN ONE (1) OUNCE OF MARIHUANA, A CONTROLLED SUBSTANCE, WITHIN 1500 FEET OF A BUILDING WHICH IS ALL OR PART OF A PUBLIC ELEMENTARY SCHOOL AND SENTENCED TO SERVE TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY A $5,000.00 FINE AND ALL FEES AFFIRMED.

DAN M. LEE, C.J. PRATHER and SULLIVAN, P.JJ., and BANKS, JAMES L. ROBERTS, Jr., SMITH and MILLS, JJ., concur.

McRAE, J., concurs in result only.